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IN THE

Supreme Court of the United States

RON J. DUMONTIER, JOHN FUGLE, ANDREW HARVIE, DAVID D. HARVIE; DARREN HUGHSON, JOHN HARPER, TORY KJELSTRUP, TODD LOBREAU, ELBERT LOOMIS, ALLAN LUNGAL, WILLIAM L. ROBBINS, WILLIAM J. SCOFIELD, RON L. SMATHERS, and GERALD LAMB,

Petitioners,

v.

SCHLUMBERGER TECHNOLOGY CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the district court's ruling that Plaintiffs failed to show "bodily injury" under 42 U.S.C. § 2014(q) of the Price-Anderson Act (the Act). Concluding that the Act has preempted Montana law defining "bodily injury," the Ninth Circuit substituted a new federal common law to define "bodily injury." The Ninth Circuit's decision directly conflicts with the holding of the Sixth Circuit and its preemption analysis is in strong tension with the Third and Seventh Circuits and this Court's decision in *Silkwood*.

1. Is the determination whether a member of the public has sustained a "bodily injury" under 42 U.S.C. § 2014(q) of the Price-Anderson Act a "substantive rule of decision"under 42 U.S.C. § 2014(hh) that must decided under the law of the state where the illegal radiation dose occurred when the Nuclear Regulatory Commission's public dose limit for members of the public was admittedly violated.

2. Whether the Price-Anderson Act preempts Plaintiffs' state law causes of action if their causes of action do not arise from a "nuclear incident" as defined under 42 U.S.C. § 2014(q) of the Price-Anderson Act.

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OPINIONS BELOW

Opinion of the Ninth Circuit Court of Appeals, reported at *Dumontier v. Schlumberger Technology Corporation*, 543 F.3d 567 (9th Cir. 2008) (App. A). Order granting Defendant's Motion to Dismiss Plaintiffs' Strict Liability Cause of Action and Granting Defendant's Motion for Summary Judgment on Plaintiffs' Public Liability Cause of Action (App. B).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on September 11, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section II, United States Constitution

42 U.S.C. § 2012(i) (2005)
42 U.S.C. § 2014(q) (2005)
42 U.S.C. § 2014(w) (2005)
42 U.S.C. § 2014(hh) (2005)
42 U.S.C. § 2210(n)(1) (2005)
42 U.S.C. § 2210(n)(2) (2005)
42 U.S.C. § 2210(s) (2005)

Federal Regulations:

10 C.F.R. § 20.1301(a)(1)
10 C.F.R § 140.81(b)(1)
10 C.F.R § 140.81(4)
10 C.F.R § 140.83

As the foregoing statutory and regulatory provisions are voluminous, they are reproduced in the attached Appendix at C and D.

STATEMENT OF THE CASE

The Ninth Circuit holds that the Act preempts Montana law on bodily injury and that Plaintiffs have not sustained "bodily injury" under federal common law even though Schlumberger admitted that it illegally subjected all Plaintiffs to radiation doses in violation of the applicable federal dose limit.

On May 21, 2002, Respondent Schlumberger Technology Corporation (hereafter, "Schlumberger") conducted a well logging operation on a drilling rig in northern Montana. Schlumberger was a licensee of the Nuclear Regulatory Commission. When Schlumberger completed its well logging, it left an extremely dangerous radioactive byproduct material, Cesium 137, on the floor of the drilling rig. Schlumberger failed to conduct required radiation surveys. Schlumberger deliberately, falsely and maliciously certified records stating that it had conducted the required surveys when in fact it had not. Plaintiffs worked on and around the rig floor on

May 21, 2002. All Plaintiffs were members of the public. All Plaintiffs were exposed to Schlumberger's dangerous radioactive Cesium 137. All Plaintiffs received radiation doses in one day that exceeded the federal dose limits for members of the public *in one year* and there is important uncertainty as to the maximum illegal radiation doses that they received. All Plaintiffs received physical injuries because of their illegal radiation doses.

Plaintiffs filed a Complaint seeking emotional distress and medical monitoring damages as well as punitive damages in federal district court on February 13, 2004. On September 22, 2005 the district court granted both Schlumberger's motion to replace Plaintiff's state law cause of action with a cause of action under the Act and Schlumberger's motion for summary judgment that the court did not have jurisdiction over Plaintiffs' claims under the Act and denied all other outstanding motions as moot. Plaintiffs timely appealed the district court's decision to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals entered its decision on September 11, 2008.

The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

Question One

Introduction

The Ninth and Sixth Circuits are deeply divided on the question whether state tort law should be used to define bodily injury under the Act. The Third and Seventh Circuit's analyses of state law preemption under the Act differ importantly from that of the Ninth Circuit and serious disagreement among them is inevitable. The Ninth Circuit's conclusion regarding the preemption of state law under the Act is also in strong tension with this Court's decision in *Silkwood*. Whether persons subjected to illegal radiation doses can recover for their injuries under the law of the state where they received their doses is an important question involving the plain meaning of the Act, Congressional intent, and the ability of members of the public to recover for injuries from illegal radiation doses.

The Act expressly requires the use of state tort law unless it is inconsistent with the Act. Section 2210(n)(2) gives original jurisdiction to a district court in any "public liability action arising out of or resulting from a nuclear incident . . . ." 42 U.S.C. § 2210(n)(2) (2005). A public liability action "means any suit asserting public liability[;] [a] public liability action shall be deemed to be an action arising under section 2210 . . . ." 42 U.S.C. § 2014(hh) (2005). Public liability means "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation . . . ." 42 U.S.C. § 2014(w) (2005).

The Act also defines nuclear incident:

> The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, *bodily injury*, *sickness*, *disease*, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . . .

42 U.S.C. § 2014(q) (2005) (emphasis added).

The Nuclear Regulatory Commission's (NRC) regulations distinguish nuclear incidents from extraordinary nuclear occurrences and provide that

> *[t]he presence or absence of an extraordinary nuclear occurrence determination does not concomitantly determine whether or not a particular claimant will recover on his claim.* In effect, it is intended primarily to determine whether certain potential obstacles to recovery are to be removed from the route the claimant would ordinarily follow to seek compensation *for his injury or damage.* If there has not been an extraordinary nuclear occurrence determination, the claimant must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met, and whatever defenses are available

> to the defendant, *under the law applicable in the relevant jurisdiction.*

10 C.F.R. § 140.81(4) (emphasis added). The NRC regulations also state that *"[i]t should be clearly understood that the criteria [for extraordinary nuclear occurrences] in no way establish or indicate that there is a specific threshold of exposure at which biological damage from radiation will take place."* 10 C.F.R. § 140.81(b)(1) (emphasis added).

A. The Ninth Circuit Decision Directly Conflicts with the Sixth Circuit.

Allowance of the writ is appropriate because the Ninth Circuit's decision in *Dumontier* directly conflicts with the Sixth Circuit's decision in *Rainer v. Union Carbide Corp.*, 402 F.2d 608 (6th Cir. 2005).

The Ninth Circuit concluded "[t]he Act doesn't call for us to apply state law in its interpretation; only for the 'the substantive rules for decision'–i.e., the available causes of action." *Dumontier v. Schlumberger Technology Corporation, Inc.*, 543 F.3d 567, 570 (9th Cir. 2008). The Ninth Circuit determined that under the Act, plaintiffs can only bring claims for exposure to radioactive materials if two hurdles are met. The first is

> if the state where the exposure occurred provides a cause of action. That's what the Act means when referring to state "substantive rules for decision." For example, if a state doesn't provide a cause of action for emotional distress, a plaintiff wouldn't have a cause of

> action for emotional distress under the Act. Or, if state law provides a cause of action for negligence but not for strict liability, the Act would provide a cause of action only for negligence.

Dumontier, 543 F.3d at 570 (citation omitted).

The Ninth Circuit determined that the second hurdle is a showing of bodily injury that must be established under a new, federal common law that the court defined to mean "pain or interference with bodily functions." *Dumontier*, 543 F.3d at 571. The Ninth Circuit thereby determined that radiation doses are only actionable under the Act when they meet the NRC's regulations for extraordinary nuclear occurrences. *Dumontier*, 543 F.3d at 570-571. The Ninth Circuit reasoned that adopting Plaintiffs' "interpretation of bodily injury would render the term surplusage, as every exposure to radiation would perforce cause injury." *Dumontier*, 543 F.3d at 570. In *In Re Berg Litig.*, 293 F.3d 1127, 1129 (9th Cir. 2002) (citation omitted), however, the Ninth Circuit concluded that "there is no threshold harmful dosage level for radiation because it can cause harm at any level."

In *Rainer*, the Sixth Circuit concluded that Kentucky *state law* would determine whether the plaintiffs in that case had sustained bodily injury under the Act:

> As this court has noted, the amendments to the Act "w[ere] not intended to alter the state law nature of the underlying tort claims. [The

> Act] provides that 'the substantive rules for decision in such action shall be derived from the State in which the nuclear incident occurs, unless such law is inconsistent with the provisions of such section.'" *Day*, 3 F.3d at 154 n. 1 (citations omitted); *see also Heinrich ex rel. Heinrich v. Sweet*, 62 F.Supp.2d 282, 296-97 (D. Mass. 1999) ("The [Price-Anderson] Act incorporates state law as the substantive rule of decision to govern the federal cause of action, so long as the state law is not inconsistent with the purposes of the Act.") Thus, the Act specifically calls for state law to provide the substantive foundations for a Price-Anderson claim. . . . *The key question before us, then, is whether Kentucky caselaw equates "subcellular damage" with "bodily injury."*

Rainer v. Union Carbide Corp., 402 F.2d 608, 617-618 (6th Cir. 2005) (emphasis added).

The Ninth and Sixth Circuits are split on whether to use state law to define "bodily injury" under the Act.

B. The Ninth Circuit Decision Conflicts with the Third and Seventh Circuits' Analysis of State Law Preemption under the Act and Disagreement Between Them Is Inevitable.

The Ninth Circuit's decision is in substantial tension with the Third Circuit's preemption analysis in *In Re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3rd Cir. 1991). Citing *In Re TMI II*, the Ninth Circuit held that § 2014(hh) of the Act means that a party can assert an action under the Act "only if the law of the applicable state provides a cause of action." *Dumontier*, 543 F.3d at 570. The Ninth Circuit and the Third Circuit, however, disagree substantively on the role of state law under the Act.

In *In Re TMI II*, the Third Circuit reversed the district court's decision that the Act violated Article III, section 2's requirement that actions brought under the Act arise under federal law because "the rules of decision for public liability actions filed in or removed to a federal court are, according to the Amendments Act, to be 'derived from the law of the State in which the nuclear incident . . . occurs." *In Re TMI II*, 940 F.2d at 851 (citation omitted).

The Third Circuit concluded, "we find that Congress intended to–and did–create *a federal cause of action* which will implicate substantive aspects of federal law." *Id.* at 854 (emphasis added). Rather than determine that the Act looks to state law merely for "causes of action," as did the Ninth Circuit, the Third Circuit concluded that "in the Amendments Act, *Congress relied upon state law as a foundation* and effectuated its purposes by creating an *overlay* of federal law." *Id.* at 855 (emphasis added).

Just as in *Rainer*, the Third Circuit determined that under the Act, state law provides substantive law:

> In this case, Congressional intent is not an issue. In explicitly providing that the "substantive rules for decision" in public liability actions "shall be derived from" the law of the state in which the nuclear incident occurred, we believe that Congress expressed its intention that *state law provides the content of and operates as federal law.*

Id. at 855 (emphasis added).

The Ninth Circuit's decision similarly cannot be reconciled with the Seventh Circuit's analysis of state law under the Act. In *O'Conner*, the Seventh Circuit also reviewed whether actions brought under the Act arose under federal law and determined:

> *Although the public liability cause of action is built around preexisting state law,* it contains some distinctively federal elements as well. The Amendments Act dictates the limitations period for a public liability cause of action, 42 U.S.C. § 2210(n)(1), provides for venue, § 2210(n)(2), limits the availability of punitive damages in an action arising out of an ENO, § 2210(s), and mandates that normally - available defenses be waived in the cases of ENOs, § 2210(n)(1). *The Amendments Act, therefore, forms the state-based cause of action into the federal mold.*

O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1097 (7th Cir. 1994) (emphasis added).

The Seventh Circuit concluded:

> Congress did not adopt in wholesale fashion state law. State law serves as the basis for the cause of action only as long as state law is consistent with the other parts of the Act. Congress desired that state law provide the content for and operate as federal law; however, *Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any cause of action grounded in state law.* This recognition is explicit in the Amendments Act's legislative history. In discussing the need for reauthorizing the Price-Anderson Act, the Senate Committee on Environment and Public Works reported:
>
> The Price-Anderson system, including the waiver of defenses provisions, the omnibus coverage, and the predetermined sources of funding, provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages over the procedures and standards for recovery that might otherwise be applicable under State tort law.

S.Rep. No. 218 at 4. Thus, although the basis for a public liability cause of action is state law, the applicable law is only "derived" from state law. The Price-Anderson system, by design, alters state tort law to forward the goals of that act: to "protect the public and

> . . . encourage the development of the atomic energy industry." *http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW8.11&ifm=NotSet&fn=_top&sv=Split&tc=-1&docname=42USCAS2012&ordoc=1994023977&findtype=L&db=1000546&utid=1&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Montana* 42 U.S.C. § 2012[i].

O'Conner, 13 F.3d at 1100 (emphasis added).

Both the Third and Seventh Circuits examined Congress' intent in the Act and concluded that public liability actions are *built* upon state law.

C. The Ninth Circuit Is Also in Friction with this Court's Decision in Silkwood.

The Ninth Circuit has disregarded this Court's decision in *Silkwood* construing Congressional intent in the Act.

In *Silkwood* the Court construed the Act, in its pre-1988 amendments form, in deciding whether a "state-authorized award of punitive damages arising out of the escape of plutonium from a federally-licensed nuclear facility is preempted . . . ." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 241 (1984).

After reviewing Congressional intent, the Court concluded

> Congress assumed that traditional principles of state law would apply with full force unless

> they were expressly supplanted. . . . *No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based upon its own law of liability.* But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less.

Silkwood, 464 U.S. at 255-256 (emphasis added). The tension to which the Court referred is absent in the present case, because Plaintiffs agreed below that the applicable federal safety regulation, which Schlumberger violated, is the standard of care. *See* 10 C.F.R. § 20.1301(a)(1) (federal public dose limit).

Although the Act was amended in 1988, the 1988 amendments have not diminished the substantive role that state law plays in public liability actions. *See O'Conner* and *In Re TMI II*, *supra* (construing the Act *after* its amendments in 1988).

Question two.

Introduction.

The Ninth Circuit held that the Act has absolutely preempted any conceivable state law claim that a person, illegally subjected to radiation in excess of the federal dose limit, could bring if his claim is not cognizable as "bodily injury" under the Ninth Circuit's federal

common law definition of bodily injury. *Dumontier*, 543 F.3d at 571. Whether a person should be stripped of all conceivable recourse for his illegal radiation injuries is an important question with a national scope that reflects the wide breadth of nuclear operations in the United States. On this issue the Ninth Circuit conflicts with the preemption analyses of the Third and Seventh Circuits and disagreement among them is likely. The Ninth Circuit's conclusion is also inconsistent with this Court's preemption analysis in *Silkwood*.

The Act grants federal district courts original jurisdiction over *nuclear incidents*, not *any* incident in which radioactive material is involved. Section 2210(n)(2) provides in pertinent part

> (2) With respect to any public liability action *arising out of or resulting from a nuclear incident*, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant . . . any such action pending in any State court . . . shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2) (2005) (emphasis added).

The Act states that a federal court has original jurisdiction in the event of a "nuclear incident." If there is no nuclear incident, then a federal district court does not have original jurisdiction under the Act and the removal provision of 42 U.S.C. § 2210(n)(2) (2005) does not apply.

In *In re TMI II*, the Third Circuit recognized that state law causes of action in radiation cases could be brought *outside* the Act:

> Under the terms of the Amendments Act, the "public liability action" encompasses "*any* legal liability" of any "person who *may* be liable" *on account of a nuclear incident.* Given the breadth of this definition, the consequence of a determination that a particular plaintiff has failed to state a public liability claim potentially compensable under the Price-Anderson Act is that he has no such claim at all. After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all. *Any conceivable state tort action which might remain available to a plaintiff following the determination that his claim could not qualify as a public liability action, would not be one based on "any legal liability" of "any person who may be liable on account of a nuclear incident."* It would be some other species of tort altogether, and the fact that the state courts might recognize such a tort has no relevance to the Price-Anderson scheme.

In re TMI II, 940 F.2d at 854-855 (citation omitted) (emphasis added).

In his concurring opinion, Judge Scirica agreed that under the Act, "a finding that a particular claim does not fall within the definition of *'public liability' does not preclude the plaintiff from pursuing that claim in state court under a different name.*" *Id.* at 863 (Scirica, J., concurring) (emphasis added).

In *O'Conner*, the Seventh Circuit also did not determine that the Act's 1988 amendments embraced *any* cause of action involving radiation injuries. Rather, the Seventh Circuit determined that the 1988 amendments to the Act broadened the Act's reach "to provide for removal of, and original jurisdiction over, claims arising from any *'nuclear incident,'* instead of actions arising only from ENOs [extraordinary nuclear occurrences]." *O'Conner*, 13 F.3d at 1096 (citation omitted) (emphasis added).

Absent a "nuclear incident" under the Act, moreover, *Silkwood* does not preempt Plaintiffs' state law causes of action for their illegal radiation injuries. In *Silkwood*, the Court ruled that

> state law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both federal and state law, or where the state law stands as an obstacle to

> the accomplishment of the full purposes and objectives of Congress.

Silkwood, 464 U.S. 238, 248 (citations omitted).

In the present case, the predicates for preemption in *Silkwood* are conspicuously absent. There is no conflict between state and federal standards of care, because the federal dose limit for members of the public is the applicable standard of care. It is certainly possible for a *responsible* nuclear actor to comply with both Montana law on bodily injury and federal law on dose limits. The second part of *Silkwood's* preemption test also does not apply. The use of Montana law to define "bodily injury" would not frustrate the purposes of the Act. "Congress enacted the Price-Anderson Act 'to protect the public and to encourage the development of the atomic energy industry.'" *In Re TMI*, 67 F.3d 1103, 1107 (3rd Cir. 1995) (citation omitted).

If Plaintiffs have failed to demonstrate "bodily injury" under the Ninth Circuit's novel federal common law definition of "bodily injury," then the subject incident was not a nuclear incident and the Act has not preempted Plaintiffs' Montana cause of action. By its express terms, the Act only preempts claims involving nuclear incidents.

CONCLUSION

The Ninth Circuit has clearly erred in holding that the Act preempts Montana state law defining bodily injury. The agreed standard of care is the *federal* public dose limit for members of the public. Plaintiffs were in Montana when Schlumberger caused them bodily injury with illegal radiation doses. The Act requires that Montana law provide the substantive rules of decision unless it is inconsistent with the Act. The Ninth Circuit has identified no inconsistency between Montana law defining bodily injury and the Act. Instead, the Ninth Circuit has speculated that allowing state law to define bodily injury could lead to increased litigation of claims and a "strict liability" cause of action. *See Dumontier*, 543 F.3d at 570-571.

The Ninth Circuit has also clearly erred in substituting a federal common law for Montana law on bodily injury, which federal common law it took from the NRC's regulations for extraordinary nuclear occurrences. The Ninth Circuit determined that any incident falling short of the NRC's threshold for an extraordinary nuclear occurrence is not bodily injury under the Act.

Again, however, the NRC's regulations emphasize that the threshold for bodily injury is *not* the threshold for extraordinary nuclear occurrences, concluding that "[i]f there has not been an extraordinary nuclear occurrence determination, the claimant must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met, and whatever defenses are available to the defendant, *under the law applicable*

in the relevant jurisdiction. 10 C.F.R. § 140.81(4) (emphasis added). The Ninth Circuit's rejection of the federal dose limit for members of the public is error.

Moreover, the Act provides for concurrent jurisdiction, strong evidence of Congress' intent that state law define bodily injury absent an inconsistency with the Act that the Ninth Circuit failed to identify. *See* 42 U.S.C. § 2210(n)(2) (2005) (providing concurrent jurisdiction).

On Question one, the Ninth Circuit directly conflicts with the Sixth Circuit and on both Questions one and two, the Ninth Circuit is in strong tension with the Third and Seventh Circuits. The Ninth Circuit also conflicts with this Court's interpretation of Congressional intent in *Silkwood* regarding the role of state law under the Act.

For all the reasons set forth above, allowance of Plaintiffs' writ is appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 11, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-36005

D.C. No.
CV-04-00016-RFC

OPINION

RON J. DUMONTIER; JOHN FUGLE; ANDREW HARVIE; DAVID D. HARVIE; DARREN HUGHSON; JOHN HARPER; TORY KJELSTRUP; TODD LOBREAU; ELBERT LOOMIS; ALLAN LUNGAL; WILLIAM L. ROBBINS; WILLIAM J. SCOFIELD; RON L. SMATHERS; GERALD LAMB,

Plaintiffs-Appellants,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Appendix A

Argued and Submitted April 12, 2007
Submission Vacated December 24, 2007
Resubmitted June 2, 2008
Seattle, Washington

Filed September 11, 2008

Before: Alex Kozinski, Chief Judge, Raymond C. Fisher, Circuit Judge, and Andrew J. Guilford,* District Judge.

Opinion by Chief Judge Kozinski

OPINION

KOZINSKI, Chief Judge:

We consider whether subcellular damage amounts to bodily injury under the Price-Anderson Act.

Facts

Schlumberger Technology Corporation's employees carelessly left some cesium-137 on a drilling rig. Plaintiffs later worked on the rig and were exposed. Though less well known than uranium or plutonium, cesium isn't a substance to be toyed with. Unprotected exposure can cause burns, radiation sickness and cancer;

* The Honorable Andrew J. Guilford, United States District Judge for the Central District of California, sitting by designation.

if ingested, it causes mania. Randal C. Nelson, *Songs of Cesium* (1996), http:// www. cs. rochester.edu/u/nelson/cesium/cesium_songs.html.

Plaintiffs have not developed cancer or any other illness. Nevertheless they sued Schlumberger, claiming that the radiation caused subcellular damage, including to their DNA. They brought a claim under Montana law seeking damages for emotional distress, medical monitoring and actual malice. Schlumberger argued that this claim was preempted and moved to replace it with a federal cause of action under the Price-Anderson Act, 42 U.S.C. § 2014(hh); it also moved for summary judgment on the Price-Anderson claim. The district court granted both motions and plaintiffs appeal.

Analysis

A nuclear incident is defined in the Act as "any occurrence . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). Exposure to radioactive materials is compensable only if it causes one of the harms on this list. *Phillips v. E.I. DuPont De Nemours & Co. (In re Hanford Nuclear Reservation Litig.)*, 534 F.3d 986, 1009-10 (9th Cir.2008); *see also Berg v. E.I. DuPont De Nemours & Co. (In re Berg Litig.)*, 293 F.3d 1127, 1131 (9th Cir.2002); *Brannon v. Babcock & Wilcox Co., Inc. (In re TMI Litig.)*, 940 F.2d 832, 854 (3d Cir.1991).

1. Plaintiffs claim that they suffered a listed harm, namely bodily injury, if we interpret bodily injury under Montana law. According to plaintiffs, we must do so pursuant to 42 U.S.C. § 2014(hh), which provides that "the substantive rules for decision in [an action under the Act] shall be derived from the law of the State in which the nuclear incident involved occurs." In *Rainer v. Union Carbide Corp.*, 402 F.3d 608, 618 (6th Cir.2005), the Sixth Circuit held that "[t]he key question [under this section] . . . is whether [state] caselaw equates 'sub-cellular damage' with 'bodily injury.' "

Unlike the Sixth Circuit, we have never relied on state law to interpret bodily injury. *See Berg*, 293 F.3d at 1133 ("We of course are interpreting a federal statute."). Nor would doing so be faithful to the statutory scheme. The Act doesn't call for us to apply state law in its *interpretation;* only for "the substantive rules for decision"—i.e., the available causes of action. *See In re TMI Litig.*, 940 F.2d at 855-56.

The Act imposes two independent limits on claims based on exposure to radioactive materials. First, as noted above, plaintiffs can bring such claims only if the state where the exposure occurred provides a cause of action. That's what the Act means when referring to state "substantive rules for decision." 42 U.S.C. § 2014(hh). For example, if a state doesn't provide a cause of action for emotional distress, a plaintiff wouldn't have a cause of action for emotional distress under the Act. Or, if state law provides a cause of action for negligence

but not for strict liability, the Act would provide a cause of action only for negligence.

In addition, the Act prohibits recovery when plaintiffs haven't suffered "bodily injury, sickness, disease, or death"—even when the state cause of action doesn't have that limitation. *Phillips*, 534 F.3d at 1009; *see Berg*, 293 F.3d at 1131 (rejecting emotional distress claim without physical injury, despite Washington state law allowing it) (citing 42 U.S.C. § 2014(q)). The Act isn't an invitation to survey state jurisprudence on the meaning of bodily injury, sickness or disease. Quite the opposite: It's a bar to claims that would otherwise be actionable under state law, a bar imposed by federal law and therefore interpreted as a matter of federal law.

Were we to consult state law to define bodily injury, section 2014(hh)'s preemption clause—which bars causes of action that are "inconsistent with the provisions of" the Act—would lose much of its force. A state could simply expand the meaning of bodily injury, sickness or disease to include emotional distress. The Act was designed to safeguard the nuclear industry from expansive liability under state law, *see Berg*, 293 F.3d at 1133; plaintiffs' interpretation would permit an end run.

2. We next consider whether the term "bodily injury" in the Act includes subcellular damage. Plaintiffs argue that the slightest exposure to radiation damages cells by denaturing proteins and modifying DNA. This, they argue, qualifies as bodily injury under the Act. But not every alteration of the body is an injury. Thinking

causes synapses to fire and the brain to experience tiny electric shocks; fear stimulates the production of chemicals associated with the fight-or-flight response. All life is change, but all change is not injurious. Adopting plaintiffs' interpretation of bodily injury would render the term surplusage, as every exposure to radiation would perforce cause injury. *Cf. Berg*, 293 F.3d at 1133 (noting that the Act is intended to limit liability for nuclear incidents).

Plaintiffs argue that exposure to radiation surely causes bodily injury if it exceeds the federal dose limit for members of the public. But "[t]he various limits in present NRC regulations . . . have been set at a level which is conservatively arrived at by incorporating a significant safety factor. Thus, a discharge or dispersal which exceeds the limits in NRC regulations . . . although possible cause for concern, is not one which would be expected to cause substantial injury or damage unless it exceeds by some significant multiple the appropriate regulatory limit." 10 C.F.R. § 140.81(b)(1). X-ray technicians, for example, are routinely exposed to more radiation than the public dose limit allows. *Compare* 10 C.F.R. § 20.1201(a)(1)(i) (limiting occupational exposure to 5 rem per year) *with* 10 C.F.R. § 20.1301(a)(1) (limiting exposure for members of the public to 0.1 rem per year). This reading would make exceeding the federal dose limit a strict liability offense, with damages determined by the extent of emotional distress. The Act would cease to be a liability limit and become an unlocked cash register.

Plaintiffs presented evidence that radiation always "damage[s] the DNA or other important cellular components." But this damage does not establish that there is or will be pain or interference with bodily functions, and thus isn't an injury within the meaning of the Act. Plaintiffs' expert also explained that these subcellular alterations increase the risk of cancer. The Act, however, permits recovery for disease—not simply a risk of disease. We have previously held that such a risk isn't compensable. *Berg*, 293 F.3d at 1131.

3. Plaintiffs argue that if the harm they suffered isn't on the section 2014(q) list, the Act simply doesn't apply, and their state claims aren't preempted. But we held in *Phillips*, 534 F.3d at 1009-10, that *any* suit seeking compensation for a nuclear incident is preempted by the Act. *See also Golden v. CH2M Hill Hanford Group, Inc.*, 528 F.3d 681, 683 (9th Cir.2008). Plaintiffs claim compensation for exposure to radioactive material, so they can only recover if they meet the requirements of the Act.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION FILED SEPTEMBER 22, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV 04-16-BLG-RFC

ORDER

RON J. DUMONTIER, JOHN FUGLE, ANDREW HARVIE, DAVID HARVIE, DARREN HUGHSON, JOHN HARPER, TORY KJELSTRUP, TODD LOBREAU, ELBERT LOOMIS, ALLAN LUNGAL, WILLIAM L. ROBBINS, WILLIAM J. SCOFIELD, RON L. SMATHERS,

Plaintiffs,

vs.

SCHLUMBERGER TECHNOLOGY CORP.,

Defendant.

INTRODUCTION

This matter comes before the Court on Defendant's Motion to Dismiss Plaintiffs' Strict Liability Cause of Action and Substitute Sole Statutory Public Liability Cause of Action and Motion for Summary Judgment on

Plaintiffs' Public Liability Cause of Action. Defendant first contends that with respect to an alleged radiological exposure, Plaintiffs are limited by federal statute to a Price-Anderson Act (Act) Public Liability Action (PLA) Claim. Defendant then asserts that Plaintiffs' emotional distress and medical monitoring claims in conjunction with the PLA are barred because they require a present "bodily injury" which is absent in the present facts.

Plaintiffs counter that a PLA claim is not their sole remedy because the exposure in question may not be a "nuclear incident" under the statute, in which event the Act's preemption does not apply and the state law claim survives. Plaintiffs also argue that they sustained a physical injury or impact from their exposure to the ionizing radiation and even a minimal amount of radioactivity in the body represents a "bodily injury" at the sub-cellular level and is sufficient to survive summary judgment under a PLA.

FACTUAL BACKGROUND

Defendant Schlumberger Technology Corp. conducts well logging activities on drilling rigs in the vicinity of Havre, Montana. In the course of its well logging business, Defendant used a radioactive substance known as Cesium-137. Cesium-137 is normally shielded in a transportation container. On or about May 21, 2002, the Cesium-137 was left outside of its shielded container and remained on a drilling rig for an extended period of time while the rig was transported. Consequently, Plaintiffs allege they were exposed to

unshielded radiation resulting in injuries and damages. However, aside from sub-cellular damage, no medical doctor is able to diagnose any known objective present medical condition caused by the radiation exposure.

I. Defendant's Motion To Dismiss Plaintiffs' Strict Liability Cause Of Action And Substitute Sole Statutory Public Liability Cause Of Action.

The Court must first determine if Plaintiffs are limited to the PLA claim as their sole cause of action. Defendant contends that because Plaintiffs' Amended Complaint asserts a public liability as defined by 42 U.S.C. § 2014(hh), the PLA is the sole cause of action available to Plaintiffs and the state based strict liability cause of action should be dismissed.

Plaintiffs counter that the alleged exposure in this case might not qualify as a "nuclear incident" as defined in the statute and therefore the PLA's exclusivity does not control. In their Response to Defendant's Motion to Dismiss the Strict Liability Cause of Action, Plaintiffs concede that if the physical injuries and impacts alleged by Plaintiffs qualify as "bodily injuries" under the Act, then the incident was a "nuclear incident" and the PLA applies (*See Pltfs' Resp. p. 5*). In their Response to Defendant's Motion for Summary Judgment Plaintiffs take the position that even low levels of radiation are capable of causing damage to DNA. (*See Pltfs' Resp. p. 4*). Plaintiffs argue that a radiation dose above the Nuclear Regulatory Commission's dose limits for members of the public is a physical injury. *Id. at 3.*

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The Act provides that, "[a] public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section." 42 U.S.C. § 2014(hh). The Act broadly defines a "public liability" and a "nuclear incident" as follows:

> [T]he term 'public liability' means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation . . . ." A nuclear incident is defined as, "**any occurrence,** including an extraordinary nuclear occurrence, within the United States **causing,** within or outside the United States, **bodily injury, sickness, disease, or death,** or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: . . . ." 42 U.S.C. § 2014 (q) (Emphasis supplied).

The Act contains an unusual preemption provision that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims. *See* 42 U.S.C. § 2014(hh), *See also El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-485, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999).

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The Supreme Court has concluded that "the safety of nuclear technology [is] the exclusive business of the Federal Government. . . ." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 208, 103 S.Ct. 1713, 1724, 75 L.Ed.2d 752 (1983). The Seventh Circuit Court of Appeals has observed that, "state regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law." *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir.), *cert. denied*, 512 U.S. 1222, 114 S.Ct. 2711 (1994). The Tenth Circuit Court of Appeals points out that, "the jurisdictional provisions of the PAA [the Act], 42 U.S.C. §§ 2014(w), 2210(n), as amended by the 1988 Amendments, appear broad enough to create a federal forum for any tort claim even remotely involving atomic energy production." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997). Finally, the Ninth Circuit has held, "After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (9th Cir.1991). By passing the Act, Congress created an exclusive federal cause of action for radiation injury. *See Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1306 (11th Cir. 1998), *cert denied*, 525 U.S. 1139 (1999).

It is clear that in drafting the Act, Congress expressed a legislative intent to regulate radiological exposures with the underlying substantive foundations applied from state law. Plaintiffs allege that as a result

of Defendant's negligence they were exposed to radiation and suffered injury and damages. (*See* Amended Complaint ¶9). Furthermore, Plaintiffs allege that the radiation doses caused them "physical injury and impact". (*See* Pltfs' Reply Brief in Support of Motion for Partial Summary Judgment p.2). Therefore, as a preliminary matter, this Court finds that the "physical impact or injuries" caused by the radiological exposure as alleged by Plaintiffs would qualify as a "nuclear incident" and bring the cause of action within the purview of the Act. Therefore, with respect to the nuclear exposure in this case, the Act preempts Plaintiffs' state law strict liability cause of action and Plaintiffs are limited to the PLA as their sole cause of action[1].

II. Summary Judgment On Plaintiffs' Claims For Emotional Distress And Medical Monitoring Under The PLA.

Summary judgment is appropriate when "there is no genuine issue as to any material fact, and the moving

---

1. The Court notes that Plaintiffs argue in their Response Brief in Opposition to Defendant's Motion to Dismiss Plaintiffs' Strict Liability Cause of Action and Substitute Sole Statutory Public Liability Cause of Action that if the Court finds that Plaintiffs have a "bodily injury" under the PLA, then they should be given leave to amend their amended complaint to assert federal question jurisdiction. However, Plaintiffs failed to file a Motion for Leave to Amend in accordance with Rule 15 F.R.Civ.P. and Local Rule 15.1 and the Court will not consider amending pleadings at this late date.

party is entitled to judgment as a matter of law." Fed. Rule Civ. P. 56(c). The moving party must initially identify those portions of the record before the Court which it believes establish an absence of material fact. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, the party opposing summary judgment must then, "set forth specific facts showing that there is a genuine issue for trial," *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elect. Serv.*, 809 F.2d at 630 *(citing, Liberty Lobby*, 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *Id.*

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, the Court's ultimate inquiry is to determine whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are

such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *Id.* at 631.

A. Discussion

The Court must now determine if summary judgment is appropriate under the PLA with respect to Plaintiffs' claims for emotional distress and medical monitoring. Defendant argues that summary judgment is appropriate because when congress created the PLA a jurisdictional requirement was that a plaintiff's claim include a "bodily injury, sickness disease or death . . . ." 42 U.S.C. § 2014 (w). Further, Defendant reasons that Congress did not include in the Act independent claims for emotional distress or medical monitoring from which Plaintiffs seek recovery and thus those claims should be dismissed.

Plaintiffs contend that they are entitled to seek damages for emotional distress because they suffered sub-cellular changes constituting bodily injury which resulted in the substantial reasonable fear of cancer. Plaintiffs further reason that by virtue of the exposure to radioactive material, Plaintiffs suffered, "physical injuries or impacts" at the sub-cellular level and that long term medical monitoring is appropriate.

In turn, Defendant argues that Plaintiff has no present medically diagnosable injury and the Ninth Circuit rejected the very sub-cellular argument that Plaintiffs present to this Court. *See In re Berg Litigation*, 293 F.3d 1127 (9th Cir. 2002) (holding that a

bodily injury is a jurisdictional prerequisite to an emotional distress claim under the Act). In *Berg*, the Ninth Circuit applied section 2014(hh) to hold that Washington law permitting a claim for emotional distress without bodily injury is inconsistent with the Act and is preempted by it because bodily injury is a jurisdictional prerequisite to a PLA under the Act. *Id.* at 1131. Similar to the present facts, the plaintiffs in *Berg* were exposed to radiation and had not suffered any known present physical injury and nevertheless pursued claims for emotional distress and medical monitoring. *Id.* at 1130.

Plaintiffs note that *Berg* does not explicitly address whether sub-cellular changes constitute a "bodily injury". Plaintiffs further argue that the Court favorably cited *Day v. NLO*, 851 F.Supp. 869, 877 n. 3 (S.D.Ohio 1994) which held that if the plaintiffs could prove that they were exposed sufficiently to a high dose of radiation, this in itself will constitute a physical injury, sufficient to bring their action for emotional distress based on their exposure. *Id.* at 878.

It is clear under the Act, that the Court is without jurisdiction in this matter if Plaintiffs' claims for emotional distress did not arise out of a bodily injury, sickness, disease or death as a result of an exposure to radiation. The Act also provides that "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section." 42 U.S.C. § 2014(hh).

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Under Montana law, in order to recover for negligent infliction of emotional distress, the distress need only be serious or severe and does not necessarily need to be accompanied by a present bodily injury. *See Contreraz v. Michelotti-Sawyers*, 271 Mont. 300, 302 (1995). Therefore, like *Berg*, allowance of such a claim minus any "bodily injury" would be inconsistent with the provisions of the Act which require a "bodily injury". Consequently, the sole consideration left for the Court is whether the alleged sub-cellular changes caused by the radiation exposures present a "bodily injury" as contemplated by the Act.

In *Berg*, the Court notes that, "[t]he legislative history indicates that Congress added the words 'sickness' and 'disease' after 'bodily injury' in order to clarify what it meant by 'bodily injury'". *Id.* at 1131. In reviewing the legislative intent behind the Act, the *Berg* Court looks to the Nuclear Energy Liability Insurance Association (NELIA). *Id.* NELIA policies insured against bodily injury or property damage caused by nuclear incidents. *Id.* The *Berg* Court concluded that since NELIA policies did not provide coverage for purely emotional injuries, that Congress intended the same scope for the Act. *Id.*

Next, the *Berg* Court examines the Warsaw Convention which was motivated by the same concerns as the Act and notes that, "[b]oth the Supreme Court and our own cases addressing the meaning of Article 17 of the Convention have interpreted 'bodily injury' to include *only a present physical injury*. *Id.* at 1132,

citing Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 542, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991) (Emphasis Supplied).

The *Berg* Court acknowledged that there is no threshold harmful dosage level for radiation because it can cause harm at any level. *Id.* at 1129 *citing In re Three Mile Island Litig.*, 193 F.3d 613, 726-27 (3d Cir.1999). The *Berg* Court ultimately found that although the plaintiffs may have been exposed to radiation, that in and of itself did not qualify as a "bodily injury" sufficient to survive summary judgment with respect to the emotional distress claim. Therefore, while the *Berg* Court did not expressly address Plaintiffs' sub-cellular argument, this Court finds that the *Berg* Court implicitly rejected Plaintiffs' argument that sub-cellular changes due to radiation exposure minus any present physical injury constitutes a "bodily injury" as required by the Act in order for an emotional distress claim to survive summary judgment. Consequently, in accordance with *Berg*, the sub-cellular damage alleged by Plaintiffs, even though it may be directly linked with the increased likelihood of cancer, is not itself a present "bodily injury" and any PLA claim is premature.

Plaintiffs also assert a claim for medical monitoring. The *Berg* Court pointed out that similar to emotional distress claims, claims for medical monitoring are not included in the Act's jurisdictional provisions without "bodily injury, sickness, disease, or death . . . or property damage," *Id.* at 1133. Therefore, in light of this Courts findings that Plaintiffs' alleged sub-cellular changes do

not amount to a present bodily injury, Plaintiffs' claim for medical monitoring also fails to meet the jurisdictional requirements of the Act.

Consequently, this Court is without jurisdiction over Plaintiffs' claims under the PLA until such time as Plaintiffs develop an objective demonstrable present bodily injury and summary judgment is appropriate.

Therefore, based on the foregoing,

IT IS HEREBY ORDERED:

1) that Defendants Motion to Dismiss Plaintiffs' Strict Liability Cause of Action and Substitute Sole Statutory Public Liability Cause of Action [Doc. #48] is **GRANTED**;

2) that Defendant's Motion for Summary Judgment on Plaintiffs' Public Liability Cause of Action [*Doc. # 50*] is **GRANTED**;

3) all other outstanding Motions are **DENIED as MOOT**.

The Clerk of Court is directed to enter judgment for Defendant in accordance with this order.

DONE and **DATED** this 22nd day of September, 2005.

Appendix B

s/ Richard F. Cebull
RICHARD F. CEBULL
U.S. DISTRICT JUDGE

APPENDIX C — RELEVANT STATUTES

28 U.S.C.S. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * *

42 U.S.C.S. § 2012. Findings

The Congress of the United states hereby makes the following findings concerning the development, use, and control of atomic energy:

* * *

> (i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

* * * *

Appendix C

42 U.S.C.S. § 2014. Definitions

* * *

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in section 2210(l) of this title, it shall include any such occurrence outside the United States: *And provided further,* That as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States: *And provided further,* That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material licensed pursuant to subchapters V, VI, VII, and IX of

this division, which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

* * *

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. "Public liability" also includes

damage to property of persons indemnified: *Provided,* That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

* * *

(hh) The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

* * * *

Appendix C

42 U.S.C.S. § 2210. Indemnification and limitation of liability

* * *

(n) Waiver of defenses and judicial procedures. (1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which—

(A) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility,

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section,

(E) arises out of, results from, or occurs in the course of, transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section, or

(F) arises out of, results from, or occurs in the course of nuclear waste activities.

The Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or

defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e) of this section.

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place,

or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of Title 28 or within the 30-day period beginning on August 20, 1988, whichever occurs later.

* * *

(s) Limitation on punitive damages. No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.

* * * *

APPENDIX D — RELEVANT CODES OF FEDERAL REGULATION

10 C.F.R. § 20.1301

§ 20.1301 Dose limits for individual members of the public.

(a) Each licensee shall conduct operations so that—

(1) The total effective dose equivalent to individual members of the public from the licensed operation does not exceed 0.1 rem (1 mSv) in a year, exclusive of the dose contributions from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released under § 35.75, from voluntary participation in medical research programs, and from the licensee's disposal of radioactive material into sanitary sewerage in accordance with § 20.2003, and

* * * *

Appendix D

10 C.F.R. § 140.81

§ 140.81 Scope and purpose.

(a) Scope. This subpart applies to applicants for and holders of licenses authorizing operation of production facilities and utilization facilities, including combined licenses under part 52 of this chapter, and to other persons indemnified with respect to such facilities.

(b) Purpose. One purpose of this subpart is to set forth the criteria which the Commission proposes to follow in order to determine whether there has been an "extraordinary nuclear occurrence." The other purpose is to establish the conditions of the waivers of defenses proposed for incorporation in indemnity agreements and insurance policies or contracts furnished as proof of financial protection.

(1) The system is to come into effect only where the discharge or dispersal constitutes a substantial amount of source, special nuclear or byproduct material, or has caused substantial radiation levels offsite. The various limits in present NRC regulations are not appropriate for direct application in the determination of an "extraordinary

nuclear occurrence," for they were arrived at with other purposes in mind, and those limits have been set at a level which is conservatively arrived at by incorporating a significant safety factor. Thus, a discharge or dispersal which exceeds the limits in NRC regulations, or in license conditions, although possible cause for concern, is not one which would be expected to cause substantial injury or damage unless it exceeds by some significant multiple the appropriate regulatory limit. Accordingly, in arriving at the values in the criteria to be deemed "substantial" it is more appropriate to adopt values separate from NRC health and safety regulations, and, of course, the selection of these values will not in any way affect such regulations. A substantial discharge, for purposes of the criteria, represents a perturbation of the environment which is clearly above that which could be anticipated from the conduct of normal activities. The criteria are intended solely for the purposes of administration of the Commission's statutory responsibilities under Pub.L. 89-645, and are not intended to indicate a level of discharge or dispersal at which damage to persons or property necessarily will occur, or a level at which

damage is likely to occur, or even a level at which some type of protective action is indicated. It should be clearly understood that the criteria in no way establish or indicate that there is a specific threshold of exposure at which biological damage from radiation will take place. It cannot be emphasized too frequently that the levels set to be used as criteria for the first part of the determination, that is, the criteria for amounts offsite or radiation levels offsite which are substantial, are not meant to indicate that, because such amounts or levels are determined to be substantial for purposes of administration, they are "substantial" in terms of their propensity for causing injury or damage.

* * *

(4) The presence or absence of an extraordinary nuclear occurrence determination does not concomitantly determine whether or not a particular claimant will recover on his claim. In effect, it is intended primarily to determine whether certain potential obstacles to recovery are to be removed from the route the claimant would ordinarily follow to seek compensation

for his injury or damage. If there has not been an extraordinary nuclear occurrence determination, the claimant must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met, and whatever defenses are available to the defendant, under the law applicable in the relevant jurisdiction. If there has been an extraordinary nuclear occurrence determination, the claimant must still proceed (in the absence of settlement) with a tort action, but the claimant's burden is substantially eased by the elimination of certain issues which may be involved and certain defenses which may be available to the defendant. In either case the defendant may defend with respect to such of the following matters as are in issue in any given claim: The nature of the claimant's alleged damages, the causal relationship between the event and the alleged damages, and the amount of the alleged damages.

* * * *

Appendix D

10 C.F.R. § 140.83

§ 140.83 Determination of extraordinary nuclear occurrence.

If the Commission determines that both of the criteria set forth in §§ 140.84 and 140.85 have been met, it will make the determination that there has been an extraordinary nuclear occurrence. If the Commission publishes a notice in the Federal Register in accordance with § 140.82(a) and does not make a determination within 90 days thereafter that there has been an extraordinary nuclear occurrence, the alleged event will be deemed not to be an extraordinary nuclear occurrence. The time for the making of a determination may be extended by the Commission by notice published in the Federal Register.

Supreme Court, U.S.
FILED
JAN 9 - 2009
OFFICE OF THE CLERK

No. 08-745

In The Supreme Court of the United States

RON J. DUMONTIER, JOHN FUGLE, ANDREW HARVIE, DAVID D. HARVIE, DARREN HUGHSON, JOHN HARPER, TORY KJELSTRUP, GERALD LAMB, TODD LOBREAU, ELBERT LOOMIS, ALLAN LUNGAL, WILLIAM ROBBINS, WILLIAM J. SCOFIELD, RON L. SMATHERS,

Petitioners,

vs.

SCHLUMBERGER TECHNOLOGY CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Ninth Circuit create a conflict in the Circuits by ruling that Petitioners alleged "sub-cellular injuries," which have no present medical significance, are not a compensable "bodily injury" under the statutory terms of the Price-Anderson Act?

2. Is there a conflict in the Circuits on whether or not a claim for an alleged radiological injury due to exposure to "source, special nuclear or byproduct material" can be brought outside of the Price-Anderson Act?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The parent company to Respondent Schlumberger Technology Corporation is Schlumberger Limited, which is a publicly traded corporation. Schlumberger Limited owns 100% of the stock of Schlumberger Technology Corporation. Schlumberger Technology Corporation has the following non-wholly owned subsidiaries:

- H2Gen Innovations, Inc.
- Kyrogen USA LLC
- M-I L.L.C.
- Network of Excellence in Training (NExT)
- WesternGeco L.L.C.
- Camco LLC (UAE company)
- OpenSpirit Corporation
- Baker Jardine Mexicana, S.A. de C.V.
- Camco de Mexico, S.A. de C.V.

None of these subsidiaries are publicly traded.

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OPINIONS BELOW

The opinion of the District Court is not reported. The opinion of the Court of Appeals is reported at 543 F.3d 567 (9th Cir. 2008). Both opinions are reproduced in Petitioners' Appendix.

STATUTORY PROVISIONS INVOLVED

The controlling statutory text, "bodily injury, sickness, disease or death," is found in 42 U.S.C. § 2014(q) as a limitation on the federal cause of action applicable to this case pursuant to the Price-Anderson Act. The full text of Section 2014(q) is set forth in Respondent's Appendix at App. 1.

STATEMENT OF THE CASE

A. THE NATURE OF THE PRESENT LITIGATION.

This is a public liability action ("PLA") arising under the Price-Anderson Act as amended by Pub.L.No. 100-408, 102 Stat. 1066 (1988) (the "Amendments Act") (codified in scattered sections of 42 U.S.C.), an integral part of the Atomic Energy Act. 42 U.S.C. § 2011, *et seq.* The Amendments Act creates original federal jurisdiction over any "public liability action," which is "any suit asserting public liability." 42 U.S.C. § 2014(hh). "'Public liability' means any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). A "nuclear

incident" is "any occurrence . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive . . . properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(hh). Therefore, any claim for "bodily injury, sickness, disease or death" due to radiation emanating from "source, special nuclear or byproduct material" is governed by the provisions of the Amendments Act.

Petitioners were exposed to radiation from Cesium 137, a "byproduct material" under 42 U.S.C. § 2014(e). Aff. of John R. Frazier ¶ 4 (May 2, 2005) (Respondent's expert); Dep. of Carl Schumaker 8:17-20 (April 11, 2005) (Petitioners' expert). Consequently, Petitioners' sole cause of action for their claimed injury from Cesium 137 exposure is a Price-Anderson "public liability action" ("PLA").

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

This action was commenced in federal court on February 13, 2004. After discovery, Respondent moved for summary judgment because no Petitioner had a real bodily injury, only anxiety that their exposure might cause a future injury. The District Court agreed and granted Summary Judgment on September 22, 2005. Petitioners appealed to the United States Court of Appeals for the Ninth Circuit,

which affirmed the decision below on September 11, 2008.

C. THE PUBLIC LIABILITY ACTION (PLA) UNDER THE ATOMIC ENERGY ACT, AS AMENDED BY THE PRICE-ANDERSON ACT (PAA).

The federal regulation of the production and utilization of nuclear energy and its associated activities is one of the most comprehensive frameworks of federal regulation ever promulgated. *See Northern States Power Co. v. Minnesota,* 447 F.2d 1143, 1153-1154 (8th Cir. 1971), *aff'd,* 405 U.S. 1035 (1972). States are precluded from regulating the safety aspects of nuclear technology. *See Silkwood v. Kerr-McGee,* 464 U.S. 238, 249 (1984) (federal government occupies entire field of nuclear safety); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 208 (1983) ("the safety of nuclear technology [is] the exclusive business of the federal government.").

Although nuclear technology was originally a government monopoly during World War II, within ten years of passing the Atomic Energy Act of 1946 ("AEA"), Congress concluded: "[T]he national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing." *Id.* at 207 (*citing* H.R. Rep. No. 2181, 83d Cong., 2d Sess. 1-11 (1954)). Thus, the 1954 AEA ended the federal

monopoly and encouraged private sector involvement under federal licensing regulation. *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 852 (3d Cir. 1991), *cert. denied,* 503 U.S. 906 (1992); *see* 42 U.S.C. §§ 2211-2281.

The federal government "*erected a complex scheme to promote* the civilian development of nuclear energy, while seeking *to safeguard the public* and the environment from the unpredictable risks of a new technology." *Pacific Gas,* 461 U.S. at 194 (emphasis added). The Atomic Energy Commission ("AEC") (NRC's predecessor) "was given *exclusive jurisdiction* to license the transfer, delivery, receipt, *acquisition, possession, and use of nuclear materials.*" *Id.* at 207 (*citing* 42 U.S.C. §§ 2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114 (1976 ed. and Supp. IV)) (emphasis added). "Upon these subjects, *no role was left for the States.*" *Id.* at 207 (emphasis added).

As a result of private industry's reluctance to participate in nuclear energy and its associated activities because of the potential risk of "vast liability," *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 64 (1978), Congress enacted the Price-Anderson Act of 1957, 42 U.S.C. § 2210, amending the AEA of 1954. Price-Anderson's dual purpose is to protect the public by ensuring a reliable source of funds for public compensation in the event of a nuclear incident and to encourage development of the nuclear energy industry by setting limits on the liability of private industry. *See* 42 U.S.C. § 2012; *In re TMI,* 940 F.2d at 852; *O'Conner v. Commonwealth*

Edison Co., 13 F.3d 1090, 1096 (7th Cir. 1994), *cert. denied*, 512 U.S. 1222 (1994).

This case involves one of those limits Congress established when it specifically defined the term "nuclear incident" to be "any occurrence . . . causing . . . bodily injury, sickness, disease, or death." 42 U.S.C. § 2014(q). Issues of nuclear safety are completely preempted. *Pacific Gas*, 461 U.S. at 208. The "purpose of Congress is the ultimate touchstone" in preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). The scope of preemption must rest primarily "'on a fair understanding of *congressional purpose*'" which may be discerned from both the language of the statute and "the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486 (*quoting Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992)) (emphasis in original). The common meaning of the phrase "bodily injury, sickness, disease or death" does not include a mere exposure to a *potentially* harmful substance unaccompanied by any medically observable present harm to the body.

Building on preemption of the entire field of nuclear safety, Congress in 1988 passed the Amendments Act, expressly delineating the scope of existing field preemption by creating a new and exclusive federal cause of action, the PLA. The Amendments Act dramatically transformed the Price-Anderson landscape in at least three ways.

First, the Amendments Act expressly created the PLA as the *exclusive remedy* for all injury or property damage claims arising from a "nuclear incident." 42 U.S.C. § 2014(hh); *In re TMI,* 940 F.2d at 837. Prior to the 1988 Amendments Act, there was no federal cause of action, and no federal subject matter jurisdiction, for a nuclear incident that had not officially been declared to be an "extraordinary nuclear occurrence" by the NRC or DOE.[1] *In re TMI,* 67 F.3d 1103, 1105 (3d Cir. 1995), *cert. denied,* 516 U.S. 1154 (1996). Prior to the Amendments Act, persons claiming radiation-related injuries could file state law causes of action in state or federal courts, and recover under any liability theory available under state law. *Id.; Bohrmann v. Maine Yankee Atomic Power Co.,* 926 F. Supp. 211, 216-217 (D. Me. 1996). However, after the Amendments Act "*no state cause of action based upon public liability exists.* A claim growing out of any nuclear incident is compensable under the terms

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[1] Price-Anderson addresses two types of nuclear accidents: an ENO (extraordinary nuclear occurrence) and a nuclear incident (or non-ENO). Both are defined by the Act. An ENO is an accident "which the Nuclear Regulatory Commission or the Secretary of Energy . . . determines has resulted or will probably result in substantial damages," (42 U.S.C. § 2014(j)), while a nuclear incident (or non-ENO) is "any occurrence" not rising to the level of an ENO, (42 U.S.C. § 2014(q)). Only the NRC or DOE can declare an event to be an ENO, and their determination shall "be final and conclusive." 42 U.S.C. § 2014(j). They have not declared the event in this case to be an ENO and could not do so because it did not meet the required criteria; thus this case involves a nuclear incident and ENO specific provisions of Price-Anderson do not apply.

of the Amendments Act or *it is not compensable at all.*" *In re TMI,* 940 F.2d at 854 (emphasis added). *See also Roberts v. Florida Power & Light Co.,* 146 F.3d 1305, 1308 (11th Cir. 1998), *cert. denied,* 525 U.S. 1139 (1999); *Nieman v. NLO, Inc.,* 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner,* 13 F.3d at 1099-1100; 141 Cong. Rec. 510,185-01, 510,185-86 (daily ed. July 18, 1995).[2]

Second, the Amendments Act guaranteed the defendant a federal forum by providing the United States District Courts with original jurisdiction, and empowering the PLA defendant to remove the action to Federal District Court. 42 U.S.C. § 2210(n)(2).[3]

Third, Congress also mandated that the rules for decision in a PLA shall be consistent with the NRC, DOE, or AEC regulations through which the federal preemption of nuclear safety is effected, by preempting all state law rules of decision "*inconsistent*" with

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[2] The Ninth Circuit did err in its opinion below when it stated that state law causes of action constitute a limitation on the 6. That comment was prefatory language, not a holding because it was not an issue on appeal or briefed or argued. Moreover, the Petition for Writ of Certiorari does not raise that issue, which is therefore not before this Court. State law causes of action were extinguished by the 1988 Amendments Act and thus play no role in analyzing the limitations Congress created by the statutory text of the Price-Anderson Act.

[3] 42 U.S.C. § 2210(n)(2) states: "With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the incident takes place . . . shall have original jurisdiction."

the Price-Anderson Act.[4] 42 U.S.C. § 2014(hh) (emphasis added); *In re TMI,* 67 F.3d 1119, 1122 (3rd Cir. 1995); *In re TMI,* 940 F.2d at 857; *O'Conner,* 13 F.3d at 1101. After creating the exclusive PLA, Congress provided no "complete and self-sufficient body of federal law" to be applied in a PLA, but Congress rarely does so. *In re TMI Litig. Cases Consol. II,* 940 F.2d at 854. Instead, the "Price-Anderson system, by design, alters state tort law to forward the goals of that act." *Nieman,* 108 F.3d at 1552 (*quoting O'Conner,* 13 F.3d at 1100). In amending the Act, "Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any cause of action grounded in state law." *O'Conner,* 13 F.3d at 1100; *id.* at 1105 (Price-Anderson

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[4] The exact language, "such section" in § 2014(hh) (referring back to § 2210) is an artifact from the 1988 Amendments Act, which was primarily contained in § 2210. 42 U.S.C. § 2014(hh) (A PLA "shall be deemed to be an action arising under section 2210, . . ."); *O'Conner,* 13 F.3d at 1100. Both the legislative history and well established subsequent case law interpret the phrase "such section" as referring to the entire Price-Anderson Act. *See, e.g., id.* and *In re TMI Litig. Cases Consol. II,* 940 F.2d at 856 (both *citing* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 18 ("unless such law is inconsistent with the Price-Anderson Act.")); *In re TMI,* 67 F.3d at 1119, 1123 (interpreting "such section" as the "Price-Anderson Act"); *Nieman,* 108 F.3d at 1552 (considering whether plaintiff's claim was inconsistent with "the Price-Anderson Act" in section of opinion entitled "Consistency with Price-Anderson Act."); *O'Conner,* 13 F.3d at 1101 ("courts will be required to determine whether state law principles conflict with other parts of the Price-Anderson scheme."). Also, § 2210 explicitly and implicitly incorporates and defers to the existing federal regulatory framework.

operates within "a stringent regulatory background.").

By directing federal courts to "derive" federal rules for decision only from state law *consistent* with existing federal regulatory and statutory law, Congress delineated the scope of field preemption, and set its preexisting federal framework as the polestar for guiding the federal judiciary in applying this new body of federal law interpreting the PLA. *In re TMI Litig. Cases Consol. II,* 940 F.2d at 854; *O'Conner,* 13 F.3d at 1105; *Nieman,* 108 F.3d at 1552; *O'Conner v. Commonwealth Edison Co.,* 748 F. Supp. 672, 678 (C.D. Ill. 1990), *aff'd,* 13 F.3d 1090 (7th Cir. 1994), *cert. denied,* 512 U.S. 1222 (1994). In *O'Conner,* the Seventh Circuit confirmed the existing federal framework as the standard by which the consistency of state rules for decision must be measured: "[W]e must look at the Amendments Act *in the context of the entire federal statutory scheme* on nuclear power." *O'Conner,* 13 F.3d at 1095-1097 (emphasis added).

Through these important changes, the Amendments Act established an efficient, nationally uniform system in which valid claims are quickly compensated and invalid claims are denied. *See generally, id.* at 1100-1101, 1105.

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

Petitioners' petition fails to present any split in the Circuits or any "compelling reasons" for granting certiorari as required by Supreme Court Rule 10.

First, no conflict among the Circuits exists as to whether or not "sub-cellular injuries"[5] are compensable in a PLA. Petitioners assert that the Ninth Circuit's interpretation of Price-Anderson's statutory text conflicts with the Sixth Circuit and this Court's *Silkwood* opinion. In reality, the Ninth and Sixth Circuits both agree sub-cellular injuries are not compensable under Price-Anderson and *Silkwood* never commented on the issue as will be detailed *infra*. While the Ninth Circuit's analysis focused on the expression of Congressional intent as evidenced by specific statutory text and the Sixth Circuit's analysis focused on state law, both reached the same

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[5] So called "sub-cellular injuries" are no more than a loaded misnomer coined by plaintiffs' attorneys and plaintiffs' oriented experts in an attempt to manufacture an injury when none exists. It refers to the minute and often temporary changes which occur inside one single cell. Normal metabolism inside a living cell would be an example of such a sub-cellular change. No doctor or objective scientist would label a change inside a cell an "injury" if it produced no harm to the body as a whole. After all, millions of our cells normally and routinely die every day and those millions of "cell deaths" are entirely normal; causing no damage to the body. The Ninth Circuit properly recognized this phrase for what it is: hyperbole used in an attempt to claim a damage when no medical illness exists.

conclusion of no coverage. Neither court had to proceed to the third test: an analysis of whether or not a state law allowing recovery for sub-cellular injuries would be inconsistent with Price-Anderson and the complete federal preemption of nuclear safety.

Allowing PLA recovery under a state law definition of "bodily injury" for a mere exposure of no medical significance is surely inconsistent with the Price-Anderson Act's limiting language and would allow states to control an issue of nuclear safety – which is contrary to this Court's repeated and specific direction. *Pacific Gas,* 461 U.S. at 212-213 ("the federal government has occupied the entire field of nuclear safety concerns"); *Silkwood,* 464 U.S. at 240-241 ("states are precluded from regulating the safety aspects of nuclear energy"); *English v. General Elec. Co.,* 469 U.S. 72, 82 (1990) ("Congress intended that only 'the Federal Government should regulate the radiological safety aspects'") *quoting Pacific Gas,* 461 U.S. at 2050. There is no conflict on the first issue raised by Petitioners. Instead, two Circuits have reached the same result (no such damage allowed in a Price-Anderson PLA) for the same substantive reason (a so-called sub-cellular injury is not a bodily injury, sickness, disease or death) through different, but not conflicting, analytical paths.

Second, no conflict exists among the Circuits as to whether the PLA is the exclusive remedy for alleged radiological injury from a nuclear incident. Moreover, in an attempt to now escape from the Price-Anderson Act's preemption of their claim,

Petitioners make a circular argument. They argue that they are free to pursue their claims in state court since there can be no "nuclear incident" if they have no "bodily injury." Implicit in this argument is an admission that Price-Anderson applies if Petitioners do have any bodily injury from this nuclear incident. The District Court noted that "Plaintiffs concede that if the physical injuries and impacts alleged by Plaintiffs qualify as 'bodily injuries' under the Act, then the incident was a 'nuclear incident' and the PLA applies." Petitioners' Appendix B, 10a. By now arguing for relief from Price-Anderson coverage, they necessarily also concede that their alleged "sub-cellular injuries" do not rise to the level of a "bodily injury, sickness, or disease." Additionally, Petitioners' second argument is irrelevant because Petitioners have misread the statute in an attempt to eviscerate the liability limits it imposes. Price-Anderson coverage for any possible liability is triggered by the type of substance emitting the radiation which caused the "nuclear incident," not by the type of damage alleged. 42 U.S.C. § 2014(q) ("arising out of or resulting from the radioactive . . . properties of source, special nuclear or byproduct material"). Price-Anderson governs *any and all* potential liability, whether ultimately compensable or not. 42 U.S.C. § 2014(w) ("any legal liability").

Finally, evidencing their misunderstanding of the 1988 Amendments to Price-Anderson, Petitioners falsely claim "the 1988 amendments have not diminished the substantive role that state law plays in public liability actions." Petition, at 13. In fact, the

case law is to the contrary. *In re TMI Litig. Cases Consol. II,* 940 F.2d at 854 ("After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable *under the* ***terms*** *of the Amendments Act or it is not compensable at all.*") (emphasis added).

A. THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHETHER OR NOT A "SUB-CELLULAR INJURY" IS A COMPENSABLE "BODILY INJURY" UNDER PRICE-ANDERSON.

Two Circuits have addressed this issue and have come to the same conclusion: the Price-Anderson PLA is the sole cause of action for alleged "sub-cellular injuries" from a nuclear incident and the PLA does not allow such a claim.

1. The Decision Below Applied Traditional Principles Of Statutory Interpretation, And No Court Has Interpreted The Same Statutory Text In A Conflicting Way.

Congressional intent, as expressed in the text of the Price-Anderson Act, is the issue here rather than an application of state law, as Petitioners erroneously assert. Congressional intent is best found through a reasonable interpretation of the specific statutory text limiting the types of damages Price-Anderson allows. *Rainer v. Union Carbide Corp.*, 402 F.3d 608

(6th Cir. 2005), *cert. denied,* 546 U.S. 978 (2005), failed to focus on the Congressional intent of the controlling statutory text, 42 U.S.C. § 2014(q) ("bodily injury, sickness, disease or death"), and instead delved into considerations of state law and public policy. Yet, *Rainer* arrived at the same conclusion as the decision below. The court below found that Congress expressed its intent to exclude other types of damages by specifically listing the types of damage allowed and omitting other vague types of damages. As a matter of traditional statutory construction such vague "damages" are excluded because the text does not list them and instead includes words which in their ordinary use refer to a medically observable and diagnosable bodily injury. Once a court has determined that the statutory text is sufficient to determine the Congressional intent to exclude "sub-cellular injuries" as an allowable type of damage, the court need proceed no further with any additional state law analysis or examination of public policy. The Ninth Circuit did not need to reach an examination of state law. Since *Rainer* failed to first consider the congressional intent evidenced in the statutory text relied upon by the Ninth Circuit, its holding is not in conflict with the Ninth Circuit's holding in this case. Both Circuits' opinions exist in harmony: Congressional intent excludes "sub-cellular injuries" and so do considerations of state law and public policy.

The Court of Appeals for the Sixth Circuit agreed that "sub-cellular damages" ***are not*** a "bodily injury" under Price-Anderson. *Rainer,* 402 F.3d at 618-622.

The *Rainer* holding creates no conflict with the Ninth Circuit's holding in this case. While the Sixth Circuit came to its conclusion through a different primary route, comparing state law and considering public policy,[6] both Circuits arrived at the same conclusion. Their use of different perspectives in reaching the same conclusion creates no conflict warranting review by this Court. When two Circuits came to the same holding, even though they examined different aspects in their analyses, there is no conflict in the Circuits justifying this Court's review. The Circuits are in complete agreement: sub-cellular injuries are not compensable under the Price-Anderson Act.

In *Silkwood* this Court never analyzed the statutory text upon which the Ninth Circuit relied here, much less came to any conclusion which is contrary or

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[6] The *Rainer* opinion keys its analysis to phrases, "rules for decision . . . derived from the law of the state . . . unless such law is inconsistent with," in 42 U.S.C. § 2014(hh) which applies only when the Act is silent on a "substantive rule for decision"; such as which statute of limitations applies. Since the Act is not silent and congressional intent is expressed in the phrases chosen for inclusion and other phrases not included in 42 U.S.C. § 2014(q), the issue is resolved by subpart (q) long before reaching subpart (hh) phrases along with their associated consistency test. Congress chose not to include "sub-cellular" damages, pure emotional distress, mere exposure, "over" exposure or "excessive" exposure in the specific statutory text in subsection (q) limiting the types of damages Price-Anderson allows. Unfortunately, it appears the *Rainer* panel was not well served by the briefs submitted causing the panel to miss the simple statutory expression of congressional intent argument which completely resolves this issue and requires no further analysis.

inconsistent with the decision below. In fact, *Silkwood* resolved *no* issues involving a PLA and cannot even be read as *dicta* on PLAs since it was a diversity action, not a Price-Anderson PLA, and the PLA did not even exist until Congress created it four years *after* the 1984 *Silkwood* decision. *Silkwood,* 464 U.S. at 245, 251.

Congress extensively modified Price-Anderson four years later through the 1988 Amendments Act. Those Amendments obviated the *Silkwood* references to Price-Anderson. This Court's *Silkwood* opinion commented upon Price-Anderson *as it existed four years prior to the extensive changes made in the 1988 Amendments Act,* which Petitioners' Petition completely disregards. In 1984, four years before a PLA even existed, this Court held:

> No doubt there is *tension* between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. But . . . *Congress intended to stand by both concepts and to tolerate whatever tension there was between them.* We can do no less.

Silkwood, 464 U.S. at 256 (emphasis added). In two dissenting opinions, which provided the road map for Congressional legislation four years later, the Chief Justice and Justices Powell, Marshall and Blackmun strongly disagreed with the majority's analysis that tolerated the "tension" between the preemption of nuclear safety and state punitive damages awards. At

the time of *Silkwood,* non-ENO Price-Anderson cases used state law causes of action, and there was no PLA federal cause of action, which is what created the tension. Essentially, concurring with the logic of the dissents, Congress dramatically transformed the Price-Anderson landscape and resolved that "tension." *See O'Conner,* 13 F.3d at 1105 n.13. ***Congress created the precise federal remedy for persons injured by radiation that the Silkwood majority found absent.*** Beyond the punitive damages issue, the 1988 Amendments Act essentially limits *Silkwood*'s precedential value to its own facts. *See In re TMI Litig. Cases Consol. II*, 940 F.2d at 857-858; *In re TMI*, 67 F.3d at 1125 (Congress partially limited *Silkwood*'s holding in 1988).

2. The Court Of Appeals Correctly Decided The Statutory Interpretation Issue Of Congressional Intent In Limiting The PLA.

Congressional intent is first and most accurately determined by the plain meaning of the statutory text Congress chose to use and by the text Congress could have used but chose not to use. Price-Anderson statutorily creates an exclusive cause of action for any liability arising from a nuclear incident, and also limits that liability. 42 U.S.C. § 2013(d) ("to encourage the widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety

of the public."); 42 U.S.C. § 2012(i) ("In order to protect the public and to encourage the development of atomic energy industry . . . the United States . . . may limit the liability of those persons liable . . . ").

Price-Anderson does not apply to all types of radiation exposure; only exposure to radiation from "source, special nuclear or byproduct material" 42 U.S.C. § 2014(q). Petitioners' and Respondent's experts agreed that the radioactive Cesium 137 involved here, to which Petitioners were allegedly exposed, was "byproduct material" as defined in 42 U.S.C. § 2014(e), thus invoking Price-Anderson preemption for any ***allegation*** of injury. Aff. of John R. Frazier ¶ 4 (May 2, 2005) (Respondent's expert); Dep. of Carl Schumaker 8:17-20 (April 11, 2005) (Petitioners' expert). Petitioners never contested Price-Anderson coverage in the District Court or in the United States Court of Appeals. The Act covers any liability for any allegation of "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear or byproduct material." 42 U.S.C. § 2014(q). Any such liability asserted after the 1988 Amendments Act must be asserted as a federal PLA because all state law causes of action for such an event have been extinguished and replaced by the federal PLA as plaintiffs' sole remedy. *In re TMI Litig. Cases Consol. II,* 940 F.2d at 854. If plaintiffs cannot recover under a PLA, they cannot recover at all. *Id.* As the Ninth

Circuit recognized, to hold otherwise would remove any limitation on PLA claims by allowing Petitioners to sue in state court whenever Price-Anderson barred recovery. Petitioners here are not without remedy. They simply have to wait to see if their radiation exposure ever causes any real "bodily injury, sickness, disease or death," and if so, they can sue under Price-Anderson at that time.

One limitation Price-Anderson places on any Respondent's potential liability is the list of alleged damages compensable under the Act. For example, pure emotional distress is not compensable. Congress wisely realized that mere exposure, even at doses above the low safety standards, does not automatically cause bodily injury. *TNS, Inc. v. Natl. Labor Relations Bd.*, 296 F.3d 384, 402 (6th Cir. 2002), *cert. denied sub nom., Paper, Allied-Indus. Chem. & Energy Workers Intl. Union v. TNS, Inc.*, 537 U.S. 1106 (2003). Millions of Americans each year receive varying amounts of radiation from diagnostic and therapeutic medical x-ray and nuclear medicine procedures without developing any bodily injury. *Johnston v. U.S.*, 597 F. Supp. 374, 390 (D. Kan. 1984). Petitioners' own expert admitted that the very same effect he labels as "sub-cellular damage" occurs in every person receiving a dental or medical x-ray and that every single American receives identical "sub-cellular damage" from naturally occurring radiation each day. Dep. of Carl Schumaker, at 213. *Id.*; *see also* Donald E. Jose and Michael A. Garza, *The Complete Federal Preemption of Nuclear Safety*

Should Prevent Scientifically Irrational Jury Verdicts in Radiation Cases, 26 Temple Journal of Science, Technology & Environmental Law, 1, 1-5 (2007).

Adopting Petitioners' attempted "end run" definition of injury would establish a magical incantation of "sub-cellular injuries" for every mere exposure: allowing potential liability to persons with no known medical illness. Imposing liability for no real harm is directly contrary to Congressional intent expressed in statutory text when Congress chose to list "bodily injury" but not list "exposure" as a limitation on the types of damage allowed under Price-Anderson. 10 U.S.C. § 2014(q). Moreover, Petitioners' argument that they can sue in state court outside Price-Anderson if they have no "bodily injury" under the Act would destroy the very uniform scheme Congress established through the Price-Anderson Act as amended.

The Court of Appeals correctly interpreted Congressional intent, and no court has made a contrary interpretation of this specific statutory language expressing Congressional intent. If any other courts are on the analytical "collision course" predicted by Petitioners, and they are not, this Court must await a real conflict before it addresses the issue because a self-serving predicted "collision course" for a "likely disagreement" is not grounds for granting certiorari pursuant to Supreme Court Rule 10.

B. THERE IS NO CONFLICT IN THE CIRCUITS THAT A CLAIM FOR INJURY DUE TO "SOURCE, SPECIAL NUCLEAR OR BYPRODUCT MATERIAL" CANNOT BE BROUGHT OUTSIDE OF THE PRICE-ANDERSON ACT.

A Price-Anderson PLA is Petitioners' exclusive cause of action for any alleged harm from the incident in which they were involved. In the 1988 "Amendments Act," Congress extinguished all state law causes of action and replaced them with a federal cause of action whenever a claimant alleges harm from the radioactive materials specified in the Act. Congress broadly defined "public liability action" ("PLA") to mean "*any* suit asserting public liability," 42 U.S.C. § 2014(hh), and defined "public liability" to mean "*any legal liability* arising out of or resulting from a nuclear incident. . . ." 42 U.S.C. § 2014(w) (emphasis added). Congress broadly defined "nuclear incident" to mean:

> *[A]ny* occurrence . . . *within the United States* causing . . . *bodily injury, sickness, disease, or death, or loss of or damage to property,* or loss of use of property, arising out of or resulting from the *radioactive,* toxic, explosive, or *other hazardous properties* of *source, special nuclear, or byproduct material.*

42 U.S.C. § 2014(q) (emphasis added).

By broadly defining public liability to include "*any* legal liability," Congress preempted and extinguished all state law causes of action claiming injury

or damages arising from those nuclear materials. *In re TMI,* 940 F.2d at 854. The Third, Sixth, Seventh, and Eleventh Circuits have held: "after the Amendments Act, *no state cause of action based upon public liability exists.* A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *Id.* (emphasis added); *Roberts,* 146 F.3d at 1306 (The Amendments Act "creat[ed] an exclusive federal cause of action for radiation injury."); *Nieman,* 108 F.3d at 1553 ("state law claims cannot stand as separate causes of action. [Plaintiff] can sue under the Price-Anderson Act, as amended, or not at all."); *O'Conner,* 13 F.3d at 1099-1100 ("a new federal cause of action supplants the prior state cause of action."); *see also* 141 Cong. Rec. 510,185-01, 510,185-86 (daily ed. July 18, 1995).

Congress' broad definition of a "nuclear incident" conditions whether an action is a PLA on whether Petitioner alleges bodily harm or property damage from "*source, special nuclear, or byproduct material.*" "Byproduct material" is:

> (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

42 U.S.C. § 2014(e). No Circuit Court has ever ruled to the contrary. As noted *supra* Petitioners admit, and never contested, their claim arises from radiation emitted by "byproduct material." Thus, Petitioners' claims cannot exist outside Price-Anderson. Any other types of radiation exposure incidents not involving source, special nuclear or byproduct material and falling under state law were not before the District Court or the Court of Appeals, and such a hypothetical case cannot be the subject of certiorari in this case.

It is important to realize that Petitioners are not without a remedy if their exposure ever results in any real "bodily injury, sickness, disease or death." They can simply file their PLA ***after*** a doctor diagnoses such a condition and an expert opines that the radiation exposure event caused it. Petitioners' current claims for "sub-cellular injury" simply are premature at this time under the Price-Anderson Act.

CONCLUSION

No conflict exists among the Circuits. No important question of federal law should be decided by this Court. There is no compelling reason for this Court's review. Thus, the Petition should be denied.

Respectfully submitted,

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APPENDIX

42 U.S.C. § 2014 Definitions

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: Provided, however, That as the term is used in section 2210(l) of this title, it shall include any such occurrence outside the United States: And provided further, That as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States: And provided further, That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material licensed pursuant to subchapters V, VI, VII, and IX of this division, which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.